

1-25-2016

# Rish v. Home Depot Clerk's Record v. 1 Dckt. 43677

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Vol. 1 of 2

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BURDICK

COPY

CHANNEL (BLACKER) RISH,

Claimant-Appellant,

v.

THE HOME DEPOT, INC., Employer,  
and INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, Surety,

Defendants-Respondents.

SUPREME COURT NO. 43677

AGENCY'S RECORD

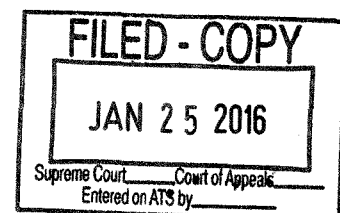
BEFORE THE INDUSTRIAL COMMISSION  
STATE OF IDAHO

CLAIMANT: CHANNEL (BLACKER) RISH

BY: PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402

DEFENDANTS: THE HOME DEPOT, INC. and  
INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA

BY: W. SCOTT WIGLE  
P.O. BOX 1007  
BOISE, ID 83701



43677

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH,

Claimant-Appellant,

v.

THE HOME DEPOT, INC., Employer,  
and INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, Surety,

Defendants-Respondents.

SUPREME COURT NO. 43677

AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION  
STATE OF IDAHO

**CLAIMANT: CHANNEL (BLACKER) RISH**

BY: PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402

**DEFENDANTS: THE HOME DEPOT, INC. and  
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STATE OF PENNSYLVANIA**

BY: W. SCOTT WIGLE  
P.O. BOX 1007  
BOISE, ID 83701

COPY

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## **LIST OF EXHIBITS**

**REPORTER'S TRANSCRIPT: TAKEN AUGUST 26, 2014 RE: CHANNEL (BLACK) RISH  
TO BE LODGED WITH THE SUPREME COURT.**

### **CLAIMANT'S EXHIBITS:**

1. Eastern Idaho Regional Medical Records (EIRMC)
2. Southeast Idaho Family Practice Dr. Christensen
3. Biddulph & Huntsman Orthopedics
4. Channing Physical Therapy
5. Mountain View Hospital
6. Zoe Interventional Pain Management
7. Ameritox
8. Carol Anderson
9. Dr. John Liljenquist
10. Dr. Gary Cook
11. Pain Specialist of Idaho Dr. Jason Post
12. Eastern Idaho Neurological Surgery Dr. Moran
13. Dr. Michael O'Brien - Neurology
14. Bingham Memorial Hospital
15. Madison Memorial Hospital
16. Manual Solutions
17. Kent Granat
18. Dr. Brett Bender
19. Pharmacy - Shopko
20. Industrial Commission
21. Medicaid Ledger
22. Non-Medical Factor
23. Pre-existing Records - Index Finger
24. Carol Anderson, Ph.D., Psychological IME
25. Dr. Christian Gussner IME
26. Dr. Robert Friedman IME
27. Dr. Gary L. Cooke IME
28. Dr. Michael O'Brien IME
29. Kent Granat Vocational Evaluation Report
30. Intermountain Vocational Services Disability Evaluation
31. Dr. Gary C. Walker IME

### **CLAIMANT MEDICAL BILLS:**

- B1. Eastern Idaho Regional Medical (EIRMC)
- B2. Dr. Christensen
- B3. Dr. Biddulph
- B4. Dr. Huntsman
- B5. Channing Physical Therapy

- B6. Mountain View Hospital
- B7. Zoe Interventional Pain Management
- B8. Manual Solutions
- B9. Dr. Liljenquist
- B10. Pain Specialist of Idaho
- B11. Dr. Brett Bender
- B12. Eastern Idaho Neurological Surgery
- B13. Bingham Memorial Hospital
- B14. Madison Memorial Hospital
- B15. Eagle Rock Anesthesia
- B16. D. J. Marc Cardinal

**DEFENDANTS' EXHIBITS:**

- A. Claimant's Deposition
- B. Idaho Industrial Rehabilitation Division Case notes
- C. Idaho Industrial Rehabilitation Division Job Site Evaluation
- D. Claimant's Resume
- E. Gary Walker, M.D., 4/18/14 Supplemental Report
- F. Mary Barros-Bailey, Ph.D., 5/28/14 Supplemental Report
- G. Mary Barros-Bailey, Ph.D., 7/14/14 Supplemental Report
- H. Payment History - Indemnity
- I. Payment History - Medical
- J. Claimant's 2000-2006 Tax Returns
- K. Kay Christensen, M.D.
- L. Idaho Physical Medicine & Rehabilitation
- M. Michael McClay, Ph.D.
- N. Gary Walker, M.D.
- O. Intermountain Vocational Service, Mary Barros-Bailey
- P. Medicaid Correspondence

**ADDITIONAL DOCUMENTS:**

**BRIEFS:**

- 1. Claimant opening brief filed 4/28/15
- 2. Defendants' response brief filed 5/15/15
- 3. Claimant's reply brief filed 5/28/15

**DEPOSITIONS:**

- 1. JASON POSTON, M.D. taken 12/3/14
- 2. CAROL V. ANDERSON, Ph.D., taken 12/16/14
- 3. KENT GRANAT taken 1/9/15
- 4. MARY BARROS-BAILEY, Ph.D., TAKEN 2/23/2015
- 5. DR. GARY WALKER TAKEN 3/4/15

02/26/2010 14:05

20854269

CURTIS&amp;BROWNING

PAGE 01/03

-FAX-

SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

### WORKERS' COMPENSATION COMPLAINT

2005-011806

CLAIMANT'S NAME <b>Channel Rish</b> <div style="background-color: black; width: 100px; height: 15px; margin: 5px 0;"></div> <b>Idaho Falls, Id 83406</b>  TELEPHONE NUMBER:		CLAIMANT'S ATTORNEY'S NAME AND ADDRESS <b>Paul T. Curtis</b> <b>CURTIS &amp; BROWNING P.A.</b> <b>598 N. Capital</b> <b>Idaho Falls, Idaho 83402</b>	
EMPLOYERS NAME AND ADDRESS (at the time of injury) <b>Home Depot</b> <b>2075 S. Holmes</b> <b>Idaho Falls, Id 83404</b>		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS <b>Helmsman Management Services</b> <b>6213 N. Cloverdale Road</b> <b>P.O. Box 7507</b> <b>Boise, ID 83720</b>	
CLAIMANT'S SOCIAL SECURITY NO. <div style="background-color: black; width: 100px; height: 15px; margin: 5px 0;"></div>	CLAIMANT'S BIRTHDAY <div style="background-color: black; width: 100px; height: 15px; margin: 5px 0;"></div>	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE <b>October 30, 2005</b>	
STATE AND COUNTY IN WHICH INJURY OCCURRED <b>Idaho, Bonneville</b>		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE of: <b>\$ 8.50 per hour §72-419, IDAHO CODE</b>	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)  <b>While in the course and scope of her employment the Claimant stepped on a floor "fatigue mat". The mat started to slide. Her left foot braced and the right foot continued to slide with the mat. Her right knee twisted with a loud "pop" followed by immediate and severe pain. Ms. Rish was diagnosed with a meniscus tear requiring multiple surgeries. She continues to suffer significant disabling pain.</b>			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE  <b>Chronic deep throbbing pain of right knee with stabbing pain in the anterior, lateral and posterior knee;          Unable to stand, sit or walk greater than 30 minutes;          Right knee sensitive to touch;          Knee buckles causing Claimant to fall;          Intervention of sleep;          Fatigue;          Depression;          Chronic Pain Syndrome.</b>			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?  <b>PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees.</b>			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER <b>October 30, 2005</b>		TO WHOM NOTICE WAS GIVEN	
HOW NOTICE WAS GIVEN <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE STATE			
ISSUE OR ISSUES INVOLVED <b>PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees.</b>			

 RECEIVED  
 200 FEB 26 P 12:26  
 INDUSTRIAL COMMISSION



SEND TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

**WORKERS' COMPENSATION  
COMPLAINT**

2005-011806

CLAIMANT'S NAME Channel Rish [REDACTED] Idaho Falls, Id 83406		CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Paul T. Curtis CURTIS & BROWNING P.A. 598 N. Capital Idaho Falls, Idaho 83402	
TELEPHONE NUMBER: [REDACTED]		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Helmsman Management Services 6213 N. Cloverdale Road P.O. Box 7507 Boise, ID 83720	
EMPLOYERS NAME AND ADDRESS (at the time of injury) Home Depot 2075 S. Holmes Idaho Falls, Id 83404		DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE October 30, 2005	
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDAY [REDACTED]	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE of: \$ 8.50 per hour §72-419, IDAHO CODE	
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho, Bonneville			
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)  While in the course and scope of her employment the Claimant stepped on a floor "fatigue mat". The mat started to slide. Her left foot braced and the right foot continued to slide with the mat. Her right knee twisted with a loud "pop" followed by immediate and severe pain. Ms. Rish was diagnosed with a meniscus tear requiring multiple surgeries. She continues to suffer significant disabling pain.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE  Chronic deep throbbing pain of right knee with stabbing pain in the anterior, lateral and posterior knee; Unable to stand, sit or walk greater than 30 minutes; Right knee sensitive to touch; Knee buckles causing Claimant to fall; Intervention of sleep; Fatigue; Depression; Chronic Pain Syndrome.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?  PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees.			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER October 30, 2005		TO WHOM NOTICE WAS GIVEN	
HOW NOTICE WAS GIVEN <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN ___ OTHER, PLEASE STATE			
ISSUE OR ISSUES INVOLVED PPI, TPD, TTD, Non-Medical Factor Disability, Past Medical Expenses, Future Medical Expenses, Retraining, and Attorney's Fees.			

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO, PLEASE STATE WHY

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL INDEMNITY FUND MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Casey L Huntsman 3300 Washington Parkway Idaho Falls, ID 83404	Dr. Kay Christensen 2775 Channing Way Idaho Falls, Id 83404
--	---

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ \_\_\_\_\_ WHAT MEDICAL COSTS HAS YOU PAID, IF ANY? \$ \_\_\_\_\_

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE ☒ Yes ☐ No

DATE  
February 26, 2010

SIGNATURE OF CLAIMANT OR ATTORNEY

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW  
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS**

NAME AND SOCIAL SECURITY NUMBER OF PARTY

DATE OF DEATH

RELATION OF DECEASED TO CLAIMANT

**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of February 2010, I caused to be served a true and correct copy of the foregoing Complaint upon:

Home Depot.  
2075 S. Holmes  
Rexburg, Idaho

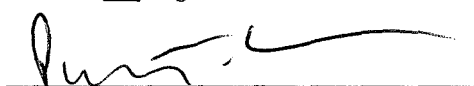
Helmsman Management Services  
6213 N. Cloverdale Road  
P.O. Box 7507  
Boise, Id 83707-1507

via: ☐ personal service of persons

☒ Regular U.S. Mail

via: ☐ personal service of persons

☒ Regular U.S. Mail

  
Paul T. Curtis

**NOTICE! An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!**

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

3

SSN or Case Number: \_\_\_\_\_

Medical Record Number: \_\_\_\_\_  
☐ Pick up Copies ☐ Fax Copies# \_\_\_\_\_  
☐ Mail Copies  
ID Confirmed by: \_\_\_\_\_

**AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION**

I hereby authorize \_\_\_\_\_ to disclose health information as specified:  
Provider Name

TO: \_\_\_\_\_  
(Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney.)

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Purpose or need for data (e.g. Worker's Compensation Claim)

Information to be disclosed: Date(s) of Hospitalization/Care: \_\_\_\_\_

- ☐ Discharge Summary
- ☐ History Physical Exam
- ☐ Consultation reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify \_\_\_\_\_

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization won't be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. *Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.* Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Signature of Patient \_\_\_\_\_ Date \_\_\_\_\_

Signature of Legal Representative & Relationship to Patient/Authority to Act \_\_\_\_\_ Date \_\_\_\_\_

Signature of Witness \_\_\_\_\_ Title \_\_\_\_\_ Date \_\_\_\_\_

**ANSWER TO COMPLAINT****I.C. NO. 2005-011806****INJURY DATE 10/23/05**

- ☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:  
☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

<b>CLAIMANT'S NAME AND ADDRESS</b> Channel (Blacker) Rish 878 Maple Wood Idaho Falls, Idaho 83406 TELEPHONE: (208)	<b>CLAIMANT'S ATTORNEY'S NAME AND ADDRESS</b> Paul T. Curtis Curtis & Browning, PA 598 North Capital Idaho Falls, Idaho 83402 TELEPHONE: (208) 542-6995
<b>EMPLOYER'S NAME AND ADDRESS</b> The Home Depot, Inc. 2075 South Holmes Idaho Falls, Idaho 83404	<b>WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS</b> Insurance Company of the State of Pennsylvania c/o Helmsman Management Services PO Box 7507 Boise, Idaho 83720
<b>ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS)</b> W. Scott Wigle (ISB #2802) BOWEN & BAILEY, LLP 1311 West Jefferson Street PO Box 1007 Boise, Idaho 83702	<b>ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)</b>

IT IS: (Check one)	
Admitted	Denied
X	
X	
X	
X	
Not	Alleged
X	
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly X entirely      by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That the notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$                                     .
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?


Medical, temporary disability benefits and PPI benefits previously paid.

5

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

- I. Whether Claimant is entitled to additional medical benefits;
- II. Whether Claimant is entitled to additional temporary disability benefits;
- III. Assessment of Claimant's PPI from the accident;
- IV. Assessment of Claimant's PPD;
- V. Apportionment pursuant to IC §72-406;
- VI. Whether Claimant is entitled to retraining benefits; and,
- VII. Whether Claimant is entitled to attorney fees

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ____ YES ____ NO				
Defendants will notify the Commission if and when mediation is appropriate.				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
No.				
Amount of Compensation paid to date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
Under Investigation	Under Investigation	Under Investigation	March 17, 2010	 W. SCOTT WIGLE - ISB #2802

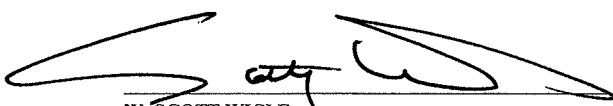
PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of March, 2010, I caused to be served a true and correct copy of the foregoing Answer upon:

Paul T. Curtis  
Curtis & Browning, PA  
598 North Capital  
Idaho Falls, Idaho 83402

via ☐ personal service of process  
☒ regular U.S. mail  
☐ facsimile

  
W. SCOTT WIGLE

Paul T. Curtis, SBN #6042  
CURTIS & PORTER, P.A.  
598 N. Capital Ave.  
Idaho Falls, ID 83402  
Telephone: (208) 542-6995  
Facsimile: (208) 542-6993

*Attorneys for Claimant*

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CHANNEL (BLACKER) RISH,	)	IC: 05-011806
	)	
Claimant,	)	NOTICE OF FIRM NAME CHANGE
	)	
vs.	)	
	)	
THE HOME DEPOT, INC.,	)	
	)	
Employer,	)	
	)	
And	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA,	)	
	)	
Surety,	)	
Defendants,	)	
	)	
	)	

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2PM AUG 19 A 10:49

NOTICE is hereby given that CURTIS & BROWNING, P.A., has changed the name of the law firm to CURTIS & PORTER, P.A., located at 598 North Capital Idaho Falls, Idaho, 83402.

All future communications, correspondence and pleadings should be addressed and directed to this office.

DATED this 16 day of August, 2010.

Paul T. Curtis / BPO  
Paul T. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true, full and correct copy of the foregoing document was served  
this 16 day of August, 2010, upon the following in the manner indicated below:

W. Scott Wigle

[X] Via Fax: (208)344-9670

Bowen & Bailey, LLP

1311 W. Jefferson

PO Box 1007

Boise, ID 83701

Telephone: (208) 344-7200

Paul T. Curtis/BDO

Paul T. Curtis



R. DANIEL BOWEN  
ERIC S. BAILEY \* also licensed in WY  
W. SCOTT WIGLE  
NATHAN T. GAMEL\* also licensed in OR

LAW OFFICE  
**BOWEN & BAILEY, LLP**  
1311 W. JEFFERSON  
PO BOX 1007  
BOISE, IDAHO 83701-1007

Telephone: (208) 344-7200  
Facsimile: (208) 344-9670  
Email: bowen-bailey@quickidaho.com

May 15, 2015

2015 MAY 15 P 3 49  
RECEIVED  
INDUSTRIAL COMMISSION

VIA HAND DELIVERY

Idaho Industrial Commission  
PO Box 83720  
Boise, Idaho 83720-0040

Re: Channel (Blacker) Rish v. The Home Depot, Inc. et al  
IC No: 2005-011806

Gentlemen:

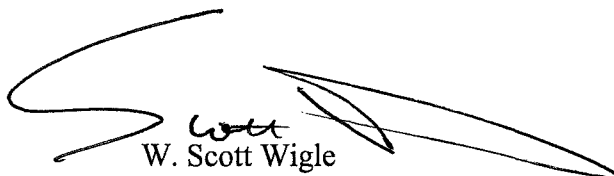
Enclosed for filing is the original Defendants' Responsive Brief along with four copies of the brief.

I need to advise the Commission that during the course of preparation of the brief, it came to my attention that Commissioner Baskin had some involvement in this matter while he was in private practice and prior to the commencement of the litigation. It appears that Mr. Baskin was contacted by a representative of the prior adjusting company, Sedgwick, and consulted with regard to an issue that arose during the course of Claimant's treatment. This is somewhat significant to resolution of at least one of the issues presented in the litigation.

It appears to me that by the time the Complaint was filed in this case Mr. Baskin was on the Commission. Frankly, I don't know if this limited involvement before the litigation commenced should have any bearing on Mr. Baskin's participation in this matter and we are not requesting that he recuse himself. I have no idea if he would even remember this. However, I thought I should bring this to the Commission's attention. The circumstances that led to Commissioner Baskin's involvement are discussed at pages 17 and 18 of the accompanying Responsive Brief.

Let me know if I can be of further assistance.

Very truly yours,

  
W. Scott Wigle

WSW/bp

cc: Referee Douglas Donohue  
Paul Curtis  
T. Nolen

9



**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

CHANNEL (BLACKER) RISH,  
Claimant,  
v.  
THE HOME DEPOT, INC.,  
Employer,  
and  
INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,  
Surety,  
Defendants.

**IC 2005-011806**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**FILED**

**SEP 23 2015**

**INDUSTRIAL COMMISSION**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Idaho Falls on August 26, 2014. Paul Curtis represented Claimant. W. Scott Wigle represented Defendants. The parties presented oral and documentary evidence. Post-hearing depositions were taken. The parties submitted briefs. The case came under advisement on June 3, 2015 and is now ready for decision.

**ISSUES**

According to the Notice of Hearing, the issues are as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause;
3. Whether Claimant is medically stable, and, if so, on what date;
4. Whether and to what extent Claimant is entitled to benefits for
  - (a) Permanent partial impairment;
  - (b) Disability in excess of PPI including 100% total and permanent disability;
  - (c) Medical care; and

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

- (d) Attorney fees;
- 5. Whether Claimant is entitled to total and permanent disability under the odd-lot doctrine; and
- 6. Whether apportionment of permanent disability for preexisting conditions are appropriate under Idaho Code § 72-406.

In post-hearing briefing Claimant added a new issue claiming 12 weeks of unpaid temporary disability benefits. Claimant abandoned the issues of total permanent disability and odd-lot disability.

Additionally, the parties represent that Commissioner Baskin represented Defendants in this matter prior to accepting appointment to the Commission.

#### **CONTENTIONS OF THE PARTIES**

The parties agree Claimant suffered a compensable accident at work on October 30, 2005. Surety paid medical and TTD benefits for a time.

Claimant contends she twisted her knee at work and injured it. After medical treatment including three knee surgeries, she still had pain and swelling. She was prematurely deemed to be at MMI by Casey Huntsman, M.D., in August 2007. Her actual MMI date should be no earlier than January 28, 2009, the date Christian Gussner, M.D., performed his second IME. Regardless of MMI date, Claimant still needs medical treatment for debilitating knee pain. Her condition has evolved to CRPS. She is entitled to medical care benefits to the date of the hearing and in the future. Surety stopped paying medical benefits in April 2009. Physicians generally agree a 5% PPI is appropriate. Claimant's disability should be found in a range of 40% to 60%. Defendants should be ordered to pay attorney fees; they acted unreasonably by paying TTDs untimely, cutting off medical benefits prematurely, and denying an evaluation at University of Utah.

Defendants contend they have paid all appropriate TTD and PPI benefits due Claimant.

#### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

Medical benefits were discontinued after expert medical opinions in 2009. Subsequent pain management treatment, including narcotics and a spinal stimulator, was not reasonable or necessary and was harmful to Claimant. Claimant failed to show an objective basis for her claim of permanent disability in excess of PPI. Claimant has failed or refused to cooperate in physicians' recommendations to achieve maximum recovery. Defendants' have acted reasonably throughout the course of this claim.

### **EVIDENCE CONSIDERED**

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and her mother;
2. Claimant's exhibits 1 through 23 and B1 through B16 admitted at hearing;
3. Defendants' exhibits A through P admitted at hearing;
4. Depositions of physiatrist Gary Walker, M.D., pain management physician Jason Poston, M.D., neuropsychologist Carol V. Anderson, Ph.D., and vocational experts Mary Barros-Bailey, Ph.D., and Kent Granat.

Objections in posthearing depositions are **OVERRULED**; **EXCEPT** the following objections are **SUSTAINED**:

Dr. Walker's deposition at pages 33-35; and  
Mr. Granat's deposition at page 15.

Claimant's proposed exhibits 24 through 31 were acknowledged by the parties to be merely duplicative and were not admitted. The record was held open post-hearing to allow the parties to review these documents further and move to admit specific documents within the set which were not duplicative, if any were found. No party moved for the admission of any document within this group.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3**

## **FINDINGS OF FACT**

1. Claimant worked for Employer on October 30, 2005. She slipped on a floor mat but did not fall. She twisted her knee. She was 26 years old.

2. While still in her recovery period, Casey Huntsman, M.D., released Claimant to full-duty work. As temporary restrictions, he recommended she avoid kneeling and that she take a 15 minute break every two hours. About January 25, 2006 Claimant returned to work. She worked until May 16, 2006. She has not worked since.

### **Medical Care Beginning October 30, 2005**

3. Claimant visited Eastern Idaho Regional Medical Center (EIRMC) ER that day. Examination was compromised by pain complaints. Where discernible upon examination, no abnormalities were noted. X-rays were normal. No specific diagnosis was made.

4. On November 1 Claimant visited Barry Bennet, M.D., at Southeast Idaho Family Practice. Dr. Bennet is a partner of Kay Christensen, M.D., Claimant's regular physician since childhood. Dr. Bennet noted, "Any realistic exam is hampered by severe pain." He diagnosed a sprain and prescribed Lortab. Throughout Claimant's course of treatment for this injury, additional unrelated visits for various ailments were attended by Dr. Christensen or nurse practitioner Cathy Arvidson, F.N.P.

5. On November 8 Claimant visited Casey Huntsman, M.D. Claimant reported her knee "gets worse with bending the knee and walking and twisting. It gets better with Hydrocodone." His examination found "trace" effusion. He noted, "I cannot do a good examination because of how tender she is." Beyond the trace swelling, he found no objective symptoms. He considered possible meniscal or ACL tears and recommended an MRI.

6. A November 17 MRI could not "absolutely exclude" a possible subtle meniscus tear, but no objective basis for her pain complaints was visible.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4**

7. On a November 29 visit to Dr. Huntsman Claimant was much better. She reported only mild tenderness. Upon examination, Dr. Huntsman noted mild crepitus and a McMurray's test positive for pain although without a "click." Otherwise the examination found no abnormalities. He assessed a probable ACL sprain with a medial meniscus contusion. He prescribed Lodine XL. Claimant refused physical therapy.

8. A December 2 EIRMC ER record states Claimant had returned to work for three days but her knee complaints were worse. "She is out of her pain medications . . . and she needs something to get through the weekend." Claimant reported tenderness. No swelling was noted.

9. On December 14 Casey Huntsman, M.D., examined Claimant prior to performing arthroscopy. Claimant reported "a lot of swelling," but Dr. Huntsman observed "trace effusion." He noted Claimant's knee had "improved dramatically." His patellar grind test was positive; Claimant reported pain with a McMurray's test, but again no click was noted. Her knee was otherwise normal. Upon diagnostic arthroscopy, he confirmed that no meniscal tear had occurred. A plica band and fat pad in her knee were shaved. All else was in "excellent condition." His post operative diagnosis: right knee medial plica band syndrome.

#### **Medical Care—2006**

10. On January 24 Dr. Huntsman released Claimant to return to full-duty work. He cautioned against kneeling and recommended allowing a 15-minute break every two hours.

11. Physical therapy notes begin May 25. The record recites multiple no-shows.

12. A July 5 MRI showed a new low-grade sprain. Increased signal at the posterior horn of the meniscus was still present. This indicator previously suggested a possible meniscal tear, but arthroscopy showed no tear was present. The radiologist considered the findings

consistent with a mild injury of the posterior cruciate ligament.

13. Dr. Huntsman did not see Claimant again until July 18. On that date she complained of right index finger pain. At this visit no mention of knee pain is noted.

14. On August 16 Dr. Huntsman performed another arthroscopy. He observed some chondromalacia and a flap tear beneath the patella. He again debrided the fat pad and plica band of her right knee and removed some scar tissue.

15. A follow-up visit about August 29 revealed no objective findings although claimant reported some soreness and swelling at night. He prescribed Relafen and Darvocet. He recommended she remain off work for one more month.

16. At a September 26 visit Dr. Huntsman noted crepitus, "a small click," with knee motion, but the examination was otherwise entirely normal. He recommended temporary work restrictions including no kneeling, squatting, or lifting over about 20 pounds.

17. At an October 24 visit Claimant reported a flare-up without any precipitating event which began two weeks prior. She had stopped attending physical therapy. On examination Dr. Huntsman noted the click "is inconsistent with motion." He injected the knee with Medrol and Marcaine. On a November follow-up visit she reported that injections had not helped, neither analgesic nor steroidal. Dr. Huntsman sought consultation from his partner, Gregory Biddulph, M.D.

18. On December 18 Dr. Biddulph expressed concern about the click but also noted, "Again, she has pain out of proportion to physical findings in the posterior, medial, and lateral compartments as well. . . . I think one of Channel's biggest problems is her smoking. The smoking has been proven to perpetuate inflammation in the joint and cause persistent inflammation. However, in addition to this I also think she does have patellofemoral pain. . . I

think the first thing we have to do before any further surgeries are accomplished, that she does have to stop smoking.”

**Medical Care: January 1 – August 9, 2007**

19. On January 18 Dr. Huntsman’s nurse noted Claimant reported she had been taking Mobic as directed, but the pharmacy reported she had not refilled the prescription since October. In February and March Dr. Huntsman performed three Synvisc injections. These did not help.

20. On March 29 Claimant visited with Nurse Arvidson about Claimant’s request for antidepressants. Nurse Arvidson prescribed Lexapro. By history, Claimant identified Lunesta and other prescriptions, not including narcotics and muscle relaxers, as part of her regular medication regimen.

21. On May 18 Drs. Huntsman and Biddulph performed a third arthroscopic surgery. They observed chondromalacia, lateral patellar compression, and some synovial fibrosis in the lateral gutter. Other areas of concern about the knee showed no abnormalities. They performed a lateral release.

22. On June 28 Dr. Huntsman rated Claimant’s finger at a 2% whole person PPI based upon range of motion. He also examined her knee and found it entirely normal and without crepitus. He noted his assistant physicians “have given her the last Hydrocodone prescription today.”

23. On July 18 Claimant first visited Holly Zoe, M.D., for pain management. Claimant reported continuing knee pain after arthroscopic surgery nine weeks earlier. Claimant reported Hydrocodone did not help. Dr. Zoe’s examination notes identify no objective knee pathology. Dr. Zoe began by prescribing a Lidocaine patch, Percocet, and Flexeril.

Dr. Zoe relied upon her physician's assistants often. The records are not clear when Dr. Zoe versus an assistant observed or opined. Because Dr. Zoe's notes routinely recite language of prior notes, it is difficult to determine which language actually pertains to the visit on the date of a note. Where possible, the date on which the first mention of a remarkable fact occurs is used below.

24. At Claimant's August 2 visit Dr. Zoe recorded mild swelling, positive varus/valgus stress test, and a positive Perkin's test as objective findings in addition to tenderness and limited range of motion. Claimant also exhibited limited range of motion in her low back, reportedly from pain. Dr. Zoe noted the Lidocaine patch had been ineffective and prescribed a Fentanyl patch. Dr. Zoe considered possible CRPS as a diagnosis. She changed from Percocet to Lortab.

25. On August 9 Dr. Huntsman opined Claimant was medically stable and rated her knee at 3% whole person for "having had a partial medical meniscectomy and some patellar chondral damage." He recommended continued pain management with Dr. Zoe.

26. On August 30 Dr. Hunsman responded to ICRD questions and approved Claimant's return to her preinjury work without restrictions, effective August 9. He acknowledged Claimant's significant residual subjective complaints.

#### **Medical Care: August 30 – December 31, 2007**

27. On August 30 Dr. Zoe noted color and temperature changes, and sought approval for a nerve block to rule out CRPS. The exam notes for August 30 inaccurately dated Claimant's last knee surgery. It appears that Dr. Zoe may have intended to refer to the October 2005 accident which was two years prior, but the notes remain ambiguous or frankly inaccurate.

28. On September 14 Dr. Zoe performed a lumbar nerve block to alleviate knee pain.



29. On October 2 urinalysis lab data was essentially as expected given Claimant's medication regimen.

30. On October 4 Dr. Huntsman noted Claimant continued to complain as before the most recent surgery. He recommended an IME to determine "what her true functional status should be."

31. On October 23 Carol Anderson, Ph.D. performed a psychological evaluation prerequisite to placement of a spinal stimulator. By history, Claimant denied prescription drug abuse and mental health treatment prior to the accident. After interview and testing, Dr. Anderson opined Claimant possessed "cognitive capacity and judgment abilities" to decide about implantation of a spinal stimulator.

32. On October 30 Dr. Huntsman declined to impose permanent restrictions within six months of the last surgery. When Claimant visited him on November 29, he did not mention restrictions.

33. On December 4 Dr. Zoe, in a letter to Claimant's attorney, noted Claimant expressed a desire to discontinue narcotics, but her pain was too great. She expressed doubt that a spinal stimulator would help. Essentially, Dr. Zoe explained she (Dr. Zoe) needed to use pain medication as a treatment modality, which modality Claimant said she did not want. Dr. Zoe recommended she visit "another pain specialist to better treat her painful condition with better expertise."

#### **Medical Care—2008 to October 2011**

34. On January 9, 2008 Christian Gussner, M.D., and Robert Friedman, M.D., reviewed records and evaluated Claimant at Surety's request. Dr. Gussner opined Claimant's current condition was a right knee sprain which exacerbated a chronic knee condition

dating back to 1994. He noted her poor compliance with physical therapy and the absence of objective findings. He opposed a stimulator trial or opioid pump. He recommended additional evaluation by Dr. Burkes at University of Utah and conditional pain management treatment, possibly with Dr. Friedman. He opined Claimant was not yet at MMI. Dr. Friedman opined similarly, noting that Claimant's failure to report an accurate history of prior knee problems factored into unnecessary surgeries on her knee. He opined that no additional medical treatment was indicated, although in order to help return her to work his WorkFit program might help.

35. On February 10, 2008 Dr. Zoe recommended a spinal stimulator.

36. On May 30, 2008 Dr. Zoe performed another lumbar nerve block for knee pain.

37. On June 20, 2008, Dr. Zoe expressly noted on examination the absence of temperature or color changes, and no allodynia—all of which she later testified in deposition would be indicators of CRPS.

38. On July 9, 2008 Claimant visited Dr. Christensen about depression. Claimant claimed an allergy to Demerol and that Lexapro gave her migraines. Dr. Christensen prescribed Cymbalta. After about 30 days, Cymbalta was discontinued as ineffective. Claimant next tried citalopram.

39. On September 12, 2008 Dr. Zoe noted lab tests which reported negative for opiates, but positive for benzodiazepine. Claimant's prescribed Lortab (Hydrocodone) did not show up. Dr. Zoe ordered additional labs for confirmation. Testing of a September 12 sample showed results consistent with Claimant's medication regimen.

40. On November 7, 2008 Claimant asserted her Lortab was insufficient to alleviate pain. Dr. Zoe increased the dosage from 7.5 to 10 mg twice per day.

41. On December 4, 2008 Dr. Zoe noted "Pain seems to be more nociceptive rather

than neuropathic.” She added Nortriptyline to the medication regimen.

42. On January 5, 2009 Dr. Zoe increased Claimant’s Lortab to three per day instead of two.

43. On January 28, 2009 Michael McClay, Ph.D., evaluated Claimant at Surety’s request. His involvement in this IME, Dr. McClay states, was part of a second IME by Drs. Gussner and Friedman. Dr. McClay opined she “has the elements of a Chronic Pain Syndrome” and noted symptom magnification and secondary gain issues. He questioned whether Claimant was “forthright” with him. His major recommendations was, “This patient needs to be out of the worker’s compensation process as quickly as possible. Functional restoration can be considered as one component of this approach.”

44. On February 5, 2009 Dr. Zoe decreased Claimant’s Fentanyl patch dosage.

45. On June 4, 2009 Claimant visited Dr. Christensen after a 4-wheeler ran over her left ankle. The records do not show any follow-up regarding this accident.

46. On August 25, 2009 Claimant visited EIRMC ER. She was out of narcotics, seeking more. The ER physician administered two Hydrocodone but refused to provide more.

47. On August 26, 2009 Gary Cook, M.D., evaluated Claimant at her attorney’s request. He reviewed records dated from November 2005 to the date of this IME and examined Claimant. He noted Claimant’s pain responses prevented a thorough examination. He found some crepitus. Dr. Cook opined Claimant was not at MMI and needed a pain management program. Nevertheless, Dr. Cook rated Claimant’s PPI using *AMA Guides*, 5<sup>th</sup> ed., and opined a 9% PPI related to Claimant’s knee and 3% related to her right index finger. Also, she opined her prognosis was that her symptoms were unlikely to significantly change. Dr. Cook recommended unquantifiable limitations, conditional upon her response to a pain

management program and a change in her reported pain levels. He suggested psychological counseling. He recommended a home exercise program, weight loss, work hardening, discontinuation of narcotics, appropriate use of OTC analgesics, in-patient chronic pain management with, for example, Dr. Friedman, psychiatric treatment for depression, and smoking cessation. Other recommendations are obscured by a handwritten note disparaging Dr. Cook's recommendation for Dr. Friedman's pain program.

48. On November 10, 2009 Dr. Christensen noted crepitus of the patella, an objective finding, upon examination. On other visits, examination notes include pain, tenderness, or other subjective complaints which are mentioned without objective signs or symptoms of knee problem. Dr. Christensen began prescribing Tylenol #3 with codeine for knee pain.

49. Throughout 2010 Dr. Christensen continued to attend Claimant's various ailments. Few subjective and no objective knee findings are included in Dr. Christensen's 2010 examination notes. Various medication changes and additions were made, but narcotics continued. In an October 13, 2011 note Dr. Christensen mentioned the possibility of fibromyalgia. On February 29, 2012 fibromyalgia was ruled out because Claimant's pain was only in her knee. An ANA IFA screening was negative for autoimmune disorders and negative for rheumatoid factors.

50. On July 8, 2010 Claimant first visited Joseph Liljenquist, M.D. On examination he noted patellar "catching," mild crepitus, and a positive grind test. All other objective symptoms and tests were normal. X-rays showed no abnormalities, acute or chronic. Dr. Liljenquist was unable to discern significant degenerative changes in the knee. He recommended against surgery and for strengthening exercises. On September 1 he suggested she see a new pain management specialist, Jason Poston, M.D.

51. On July 16, 2010 Daniel McLaughlin, M.D., in Dr. Christensen's office, examined Claimant for right foot pain after a fall. He noted some bruising.

52. On September 2, 2010 Jason Poston, M.D., at Pain Specialists of Idaho, examined Claimant. He noted some crepitus without other objective findings. He noted Claimant reported swelling and weakness in her knee, but he found none. On September 17 Dr. Poston performed a nerve block. Thereafter, he proceeded to treat Claimant using a primary diagnosis of CRPS/RSD. He performed additional nerve blocks on September 22 and 30, and October 7, 2010 with an eye toward recommending a spinal cord stimulator. On October 29 Dr. Poston's exam noted some swelling in Claimant's right knee.

53. On December 14, 2010 Dr. Poston began a Medtronic spinal cord stimulator trial. This was obtained through Medicaid. Three days later, upon Claimant's representations that her pain had decreased from a "7" to a "3" on a ten-point scale, Dr. Boston recommended permanent implantation.

54. On January 19, 2011 Stephen Marano, M.D., performed the implantation surgery. His PA, James Cook, attended follow-up visits.

55. On February 19, 2011 Dr. Poston recorded that Claimant showed "improved swelling and decreased color changes and decreased allodynia." He anticipated possible return to work two months after the date of permanent implantation. Visits in June and July 2011 showed no objective improvement in function despite Claimant's representations that her pain is usually decreased by the stimulator. She reported continued swelling and weakness of the knee. She reported her pain worsens "after the stimulator is on for a long time." She reported that, for about the last three weeks, her pain sometimes worsened with use of the stimulator. She reported her pain was spreading to her left leg.

56. On August 22, 2011 Michael O'Brien, M.D., reviewed records and examined Claimant neurologically at Claimant's request. She reported the stimulator relieved her pain only intermittently. Examining her pain response Dr. O'Brien noted, "This pain seems totally out of proportion to the type of injury that she sustained." He noted swelling in the knee "without any real pathology." He recommended a rheumatology consult. He opined he was "not totally convinced" she suffered CRPS. He rated PPI at 5% as a residual from and causally related to the 2005 accident, despite an absence of pathology. He acknowledged Claimant's subjective limitations and cautioned against prolonged standing and walking, but he imposed no specific restrictions.

#### **Medical Care: October 2011 - Hearing**

57. In October 2011 Claimant's fiancé passed away. Essentially the next day, Claimant moved herself and her two children into Claimant's parents' home. They have lived there since. Claimant's mother has become the *de facto* primary caregiver to Claimant's two sons and has substantially resumed her role watching over Claimant.

58. On November 2, 2011 Claimant reported to Dr. Poston that her pain was "constant" and "throbbing" with continued knee swelling and pain in multiple joints and muscle groups. She requested a diagnosis of fibromyalgia. She requested additional pain medications. Dr. Poston recorded no objective findings upon examination. Dr. Poston advised her that opioids do not help fibromyalgia. On December 7 Dr. Poston increased her Neurontin dosage. He recorded, "Worker's compensation want her to get a bone scan completed, but I explained that CRPS is a clinical diagnosis and cannot be tested through diagnostic testing. . . . Channel absolutely has CRPS; this is a clinical diagnosis and requires no confirmatory diagnostic testing for CRPS."

59. On January 9, 2012 Dr. Poston and a Medtronic representative reprogrammed Claimant's stimulator. She reported left leg pain also and described it as being "like nerve pain."

60. On January 24, 2012 a physical therapist saw Claimant regarding *left* leg symptoms radiating from low back pain. Although not the focus of physical therapy, Claimant's right knee symptoms were also noted. Claimant cut treatment short that day, asserting she needed to retrieve a child from school, "but then stood > 30' & told me about her fiancé's death & some of the emotional aspects." After four visits, Claimant's low back and left leg pain had significantly decreased.

61. Dr. Poston or his PA Matt Nelson attended follow-up visits as Claimant reported increasing and more constant pain bilaterally. Claimant described swelling at the stimulator battery site which Dr. Poston could not confirm upon examination. Oddly, a note of her May 7 visit states, "She has not lost work time because of it." By that point Claimant had not worked for about six years, a detail which was expressly included in a note of her May 15 visit. Also, these May visits recorded she walked with a "shuffle" or a "limp." These are the first indications of a gait disturbance since the days immediately after the reported accident. At a June 14 visit Claimant's gait had returned to normal. By August 9 her limp had returned.

62. Physical therapy records for Summer 2012 appear not to have been significantly contributory, clinically or forensically. If anything, her reports of pain increased with therapy.

63. A lumbar CT taken August 16, 2012 showed a left L4-5 disc herniation compressing the left L5 nerve root along with generalized lumbar stenosis and facet degeneration.

64. Dr. Poston's office scheduled a lumbar epidural steroid injection. On September 25, the injection was performed. The injection merely increased her pain.

65. At a January 8, 2013 visit to Dr. Poston's office, Claimant asserted her left leg pain was gone but her right knee was worse. She had no limp. Dr. Poston's office refused to prescribe medications unless Claimant agreed to random drug monitoring. Claimant was advised her function, not her self-reported pain score, would be the basis for additional opioids. On January 31 she limped. A February 18 note represents Claimant's first report of decreased sensation in her right knee. On several prior visits sensation was expressly reported as normal. Another lumbar ESI, this time on the right and at L5-S1, was performed on February 26. By March 14 Claimant reported constant back and upper back pain among her symptoms. Her gait was normal. On July 8 another lumbar ESI was performed at L5-S1 on the right. On July 24 she reported increased pain from the ESI and again limped. On July 29 and August 12 genicular nerve blocks were performed as a precursor to a possible radiofrequency ablation of the nerve. Per Claimant's August 28 report to Dr. Poston's office, the nerve blocks did not help.

66. Claimant sought attention in Hamilton, Montana. Brent Bender, M.D., reviewed records and evaluated Claimant before beginning a program of pain management in October 2013. He diagnosed CRPS 1 and "chronic pain syndrome with psycho[so]cial features including depression and anxiety."

67. On October 29, 2013, on approximately the eight-year anniversary of Claimant's accident, Claimant was evaluated by Jason Dalling, M.D., from the offices of Drs. Biddulph and Huntsman, as a new patient. Claimant reported her pain had progressively worsened since the third arthroscopic procedure. On examination Dr. Dalling noted the knee click but found no other objective signs despite Claimant's reports of exquisite global knee pain. X-rays revealed mild osteoarthritis. He diagnosed chondromalacia of the patella and prescribed home exercises.



68. In early 2014 physical therapy failed to produce positive results.

69. On February 4, 2014 a CT for the right knee showed "slight spurring" at an edge of the patella and slight joint swelling.

70. On February 24, 2014, Gary Walker, M.D., reviewed records and examined Claimant at Surety's request. He opined Claimant's pain complaints were out of proportion to objective evidence of her knee condition. His examination could not pinpoint a cause or source for her pain complaints. He opined that no objective basis existed for imposition of restrictions. He noted that by temporal coincidence, Claimant's ongoing, persistent pain complaints seemed causally related to the industrial accident. On April 18, 2014, Dr. Walker amplified his IME report. He opined she showed no objective findings which would support being off work. In deposition, Dr. Walker retracted his written opinion that the narcotics and stimulator were "not work related" because these were prescribed in response to her complaints of knee pain.

71. Claimant's regular visits to Dr. Poston's office continued. By June 2014 an issue arose once again of Claimant's compliance with opioid prescriptions. Dr. Poston's notes of record discontinue by the end of June 2014.

#### **Prior Medical Care**

72. Medical records reference care provided for epilepsy, psychological/behavioral issues and other conditions as early as age 13. The earliest available medical record dates to January 1989 when Claimant was age nine. Dr. Christensen was her primary physician during her teenage years. One note dated April 13, 1994 records a complaint of intermittent chronic knee pain. A knee immobilizer was prescribed. There are no follow-up notes. The next mention of her right leg is dated June 24, 2002. It reported muscle tenderness in posterior

calf and medial thigh which was thought to be possible phlebitis.

73. Claimant underwent right index finger surgery on January 15, 2005. Significant physical therapy did not reduce pain complaints for at least four months after surgery. She reported pain levels in the same ranges for her finger before her knee injury as she did for her knee afterward. She reported swelling which physicians were unable to confirm.

74. Claimant's first medical office visit after the knee injury shows she had been taking the sleep medication, Lunesta, before the accident.

#### **Vocational Factors**

75. Claimant's time-of-injury wage was \$8.50 per hour.

76. Claimant returned to work on January 26, 2006 upon recommendation from Dr. Huntsman. She stopped working on May 16, 2006 and has not worked since.

77. From April through September 2007 ICRD consultant Kari Rohrbach assisted Claimant. Claimant was unreliable about maintaining contact and attending appointments; it took more than a month of rescheduling to obtain an initial evaluation with Claimant. In the initial evaluation Claimant stated her prior right finger injury was a barrier to employment.

78. On August 30, 2007 Dr. Huntsman responded to ICRD inquiry and stated, "Objectively, there are no work restrictions." He went on to identify Claimant's self-reported and self-imposed limitations. He opined Claimant medically stable as of her last visit on August 9, 2007.

79. On June 1, 2012 vocational expert Kent Granat met and evaluated Claimant. He reviewed medical records. His report is dated August 10, 2012. Using three different approaches to calculate loss of labor market access, he averaged results of 87.5%, 45.4% and 45.1%. Similarly considering two disparate approaches to potential wage loss, he estimated it at

6.4% to 13.3%. Mr. Granat—in the absence of specific, physician-imposed, permanent restrictions—relied upon Claimant's oral reports of her self-imposed restrictions; he adjusted these supposed restrictions to discount what he considered to be Claimant's hyperbole. He used these self-determined restrictions to perform his disability analysis. He referred to general statements in medical notes to derive specific limitations. His evaluation assumed a 20-pound lifting restriction, limitations about bending and stooping, and an inability to be on her feet for more than two hours. Claimant also reported a prior, right-hand injury which would limit grasping. He rated Claimant's disability in a range of 33 to 36 percent, inclusive of PPI.

80. Mary Barros-Bailey opined that Claimant's earning history suggests short-term full-time or longer-term part-time employment for about nine of 11 years before the accident. Claimant's two full-time years of employment were 1999 and 2001 when she earned \$11,928 and \$12,341 respectively. Dr. Barros-Bailey reviewed medical records and noted physician's general suggestions. She opined that the absence of physician-imposed restrictions should preclude any vocational expert from having a foundation upon which to opine about disability. Physicians' notes about Claimant's subjective limitations were not endorsed by the respective physicians and cannot substitute for medical opinions. Dr. Barros-Bailey was unable to do more than speculate about Claimant's disability and declined to do so. Such speculation would violate the standards of her profession. She opined that to the extent some physicians have opined Claimant has no permanent restrictions, there can be no disability; to the extent other physicians have generally discussed limitations without imposing specific restrictions, Dr. Barros-Bailey has no foundation upon which to perform a disability analysis.

#### **Medical Opinions**

81. Medical opinions differ about whether a diagnosis of CRPS (or RSD) is

appropriate here. Some physicians include this diagnosis without specifically identifying all of the objective bases prerequisite to such a diagnosis. Other physicians recite the canon of objective bases and opine Claimant's condition does not qualify for the diagnosis. Different physicians found and did not find clinical support for the diagnosis despite their examinations being merely days apart. Dr. Poston proclaims himself an expert in the diagnosis and asserts that his word is sacrosanct without corroborating diagnostic evidence.

82. During his examination of Claimant, Dr. Walker looked for evidence of CRPS—skin discoloration, temperature changes, hypersensitivity to touch, hair and nail changes—and found none. In deposition he explained that the absence of response to a sympathetic nerve block does not dispositively preclude CRPS, but a positive test would have been consistent if CRPS were present. CRPS remains a vague and inconsistently applied diagnosis within the medical community. Its cause is not well established. CRPS is an uncommon condition which has become a common diagnosis for chronic pain despite the absence of the objective markers which define CRPS. Moreover, in treating hundreds of patients, Dr. Walker has never seen CRPS arise in relation to a knee injury or mechanical knee pain. Dr. Walker pointed out a note of Dr. Poston's which reported most objective indicators of CRPS were absent when Dr. Poston examined Claimant. Dr. Walker questioned how Claimant's examinations by Dr. Poston should inconsistently report appearing and disappearing objective indicators in a short amount of time. Dr. Walker acknowledged that symptoms of CRPS may wax and wane but not that they may appear, disappear, and reappear.

83. Dr. Walker made a "generic diagnosis" of chronic knee pain. There is no pathology in Claimant's knee which would explain her complaints. Diagnostic imaging ruled out significant arthritis.

84. Dr. Walker opined that a spinal stimulator is not used for mechanical knee pain; it may be used for CRPS. He noted Claimant's response to the spinal stimulator has been "a mixed bag." Sometimes it actually has increased her pain complaints. It has not helped increase her function. Initially, he opined that neither the spinal stimulator nor the opioid medication were work related; rather, they were a function of the chronicity of her unsupported complaints. However, he clarified his opinion by stating that although continued narcotics and/or the spinal stimulator were neither reasonable nor necessary medical care for Claimant, they were prescribed as a result of her continuing complaints following the work injury.

85. Dr. Walker opined Claimant would be most helped by discontinuation of narcotics and by increase of activity; psychological counselling or therapy might help her understand the pain she reports does not represent an injury; weight loss and stress control techniques could help as well. Activity should be increased gradually because she is so deconditioned after such a long period of inactivity. Hypothetically, this might involve recommending medium or light work at first.

86. In deposition Dr. Poston recalled that Claimant, upon examination, showed sensitivity to light touch, swelling, color and temperature changes; all are indicators of CRPS. He opined Claimant exhibited a "severe" reaction to a "more moderate" case of CRPS. Claimant's CRPS has improved; objective indicators have ameliorated with treatment. Dr. Poston's causation opinion is expressly predicated upon Claimant's representations of her history and recollections of her subjective complaints before he first examined her. Dr. Poston opined Claimant will require lifelong psychological care as well as treatment for her chronic pain. Dr. Poston testified he is not in a position to opine about whether her need for psychological care is predominantly related to the industrial accident. Dr. Poston opined

Claimant "needs to go back to work." He has not imposed permanent restrictions. He opined she should be weaned from all narcotics, but identified the practical difficulties involved.

87. Dr. Poston noted Claimant failed two urine tests; she twice showed positive for nonprescribed Hydrocodone instead of the prescribed Oxycodone. His June 19, 2014 note reflects that he addressed the issue with Claimant. When she denied knowledge of why the discrepancy arose, he changed her prescription to the Hydrocodone she preferred. He ordered drug testing for every future visit. These drug tests were expected to occur weekly and were to have constituted a prerequisite to approval of an opioid refill.

88. Dr. Poston's records are difficult to navigate. Extensive use of boilerplate, including repetition of typographical errors, makes it hard to determine whether Claimant's reports, the physician's examination, and the physician's comments or findings are actually related to the date of the various follow-up visits. Except as described in findings of fact regarding specific visits above, the presence or absence of indicators of CRPS, Claimant's progress or lack of it, and Dr. Poston's attempts at treatment are difficult to distinguish from visit to visit.

89. In deposition, Dr. Anderson described Claimant's neuropsychological evaluation which was prerequisite to the spinal stimulator. Because Dr. Anderson was unaware of any pre-injury mental health treatment, she opined Claimant's depression and need for antidepressant medication was likely related to the industrial accident.

#### **DISCUSSION AND FURTHER FINDINGS OF FACT**

90. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow,

technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, facts need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

91. Claimant presents a claim highly dependent upon the accuracy of her representations of subjective, unverifiable complaints, conditions, and abilities. Claimant's demeanor at hearing was often inconsistent with the content of her testimony. For example, Claimant made the following statements:

But I don't want to be on it (opiod medication), period. . . . And I just - - I don't want to be on it anymore. . . .

I feel like - - I almost feel like a bad mother because I feel like I'm only giving a certain percent, a small percentage, to my kids; and they deserve so much more and - - because I can't go out and do what they want when they want. And sometimes they want to go out to the park, or they want to go play baseball, or they want to just go. And I can't just do that; and, you know, I can't take them to do the things that we used to do. And so that makes me feel bad. . . .

These supposedly emotionally charged statements were delivered with a casual nonchalance—without any indication by Claimant that she felt any more emotion about them than the emotion which she showed when reciting her work history. At these and other instances in her testimony, Claimant's demeanor was inconsistent with the content of her representations.

92. By contrast, when Claimant spoke about the death of her fiancé, she showed natural emotion, within the range one would expect when a person recalls such an event. Claimant is not a stoic person. If anything, her overall demeanor was consistent with an intelligent teenager; that is, she talked and gestured demonstratively, almost floridly, and so seemed significantly younger than she is. At times throughout her testimony, where one would expect it, she exhibited voice inflection, gestures, and body posture consistent with a

likeable storyteller. Other times she was appropriately informative. Her range of demeanor when discussing general, informative, historical facts starkly contrasted with the casual unaffectedness with which she described her pain, quality of life, and desires to return to work. These findings do not attempt to discern Claimant's state of mind; rather they attempt to describe some of the foundation for the actual finding—which is that Claimant's demeanor was, at material times, inconsistent with the content of her testimony.

93. Further, Claimant's testimony about a history of consistent employment and hard work, occasionally involving two jobs at a time, is inconsistent with her Social Security earnings record. For the twelve years reported, 1995-2006, including her two best years 1999 and 2001, her average annual income was \$5,890.83; excluding those two years, her annual average was \$4,642.10. Claimant's year of injury wage was \$5,747.00, down from \$7,972 the year before, and, after the accident, her 2006 wage was \$4,328.

94. Additionally, Claimant's testimony shows a failure of memory. First, Claimant testified that ICRD consultant Ms. Rohrbach could not find a job for Claimant within her physician-imposed restrictions. Ms. Rohrbach's notes show Claimant had no work restrictions but was uncooperative; it was Claimant who believed she could not perform any work despite Ms. Rohrbach's identification of several possible jobs. Second, Claimant testified that in the end Dr. Zoe gave her 150 Hydrocodone tablets and said she did not want to see Claimant anymore. Dr. Zoe's last note, dated May 1, 2009, discusses releasing Claimant from her care after they titrate down her medication over a several-week reduction period with follow-up appointments; it states that Claimant "started screaming." Claimant denied that she screamed at Dr. Zoe. Claimant did not make or attend any follow-up appointments to cooperate with attempts to wean her from her opiate addiction.



95. In testimony Claimant describes her job goals:

If I had the opportunity to work from home where I could do - - you know, like sit, stand, take a bath when I needed to, I would be more than happy to do that, more than happy.

Claimant and her mother testified Claimant takes four to six hot baths, each lasting up to one hour or more, every day.

96. Where contemporaneously made written evidence is inconsistent with her testimony, the written evidence receives more weight.

### **Causation**

97. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

98. In the few months before the October 30, 2005 incident Claimant had been receiving regular treatment for a lingering, right index finger injury. She reported significant pain. She reported significant swelling which was unconfirmed upon multiple examinations. She received opiate analgesics to relieve the pain she reported.

99. Within about 24 hours after the alleged incident, Claimant had undergone examinations by two separate physicians who found no objective abnormalities in her knee. Both noted that her pain responses prevented a complete examination of the knee. Narcotics were prescribed to alleviate knee pain.

100. Diagnostic imaging failed to demonstrate an objective condition requiring treatment.

101. Three arthroscopic surgeries failed to show a basis for Claimant's asserted level of pain and lack of function. Nevertheless, some mild irritation and scar tissue resulting from the first arthroscopic surgery was surgically treated in the second and third arthroscopic surgeries.

102. The preponderance of medical opinions supports a probable causal link between the October 30, 2005 accident and a possible sprain of the ACL—or perhaps PCL, depending upon which physician is consulted—ligament in Claimant's right knee. Additionally, some scarring under the patella was a compensable consequence of the first arthroscopic surgery. Regardless of exact diagnosis, medical testimony and records consistently demonstrate Claimant has exaggerated her pain and claims of other symptoms.

#### **Medical Care Benefits and Maximum Medical Improvement**

103. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013). One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; see also, *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720,

591 P.2d 143 (1979)(overruled on other grounds by Chavez v. Stokes, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d \_\_\_, (July 7, 2015)).

104. To diagnose and treat Claimant's complaints of pain, medical care was reasonable from the date of the accident, October 30, 2005 through August 9, 2007. On that date, Dr. Huntsman—who had performed all three arthroscopic surgeries—opined Claimant to be at maximum medical improvement. His final diagnosis pertained to sequela of the surgeries rather than to any initial knee condition, contusion or sprain. He had, six weeks earlier, announced that his office was discontinuing Claimant's narcotics prescription.

105. In an ironic reversal of the usual arguments, Claimant asserts that her treating surgeon's—Dr. Huntsman's—opinion about the date of MMI is premature. She points to opinions of the panel IME, Drs. Gussner and Friedman, requested by Defendants in January 2008, and argues that these opinions should carry greater weight than Dr. Huntsman's. With almost the same breath, Claimant denigrates the perceived lack of neutrality of the panel because the suggested treatment included Dr. Friedman's own rehabilitation regimen. Dr. Gussner's other suggestion, an evaluation by a Dr. Burks at University of Utah, was precluded by Claimant herself, alleging insurmountable personal issues. Moreover, the panel physicians opined significant causation for the condition to a preexisting 1994 knee condition—an opinion which Claimant argues should not be considered persuasive.

106. When next they examined her on January 28, 2009, Drs. Gussner and Friedman, together with Dr. McClay, opined Claimant was medically stable. The preponderance of evidence fails to show an improvement in Claimant's condition between the dates of the two IME evaluations. The panel physicians do not identify any.

107. The preponderance of evidence shows physicians who treated Claimant after

August 9, 2007 merely provided, at best, palliative treatment which subjectively, temporarily, decreased Claimant's complaints of pain but did not provide any curative measures or restore function in a measurable way.

108. Dr. Huntsman was in the best position to evaluate Claimant at the most relevant times. He had performed the surgeries and actually observed Claimant's internal knee condition. His opinion that Claimant was at MMI as of August 9, 2007 carries the most weight.

109. About two weeks after being cut off from narcotics by Dr. Huntsman, by mid-June 2007 Claimant had secured a new narcotics prescription from Dr. Zoe. Dr. Zoe and all physicians thereafter provided only palliative care, hoping to reduce Claimant's reports of pain. But for a single recorded episode by Dr. Zoe in which she recounted that Claimant stated she did not want narcotics, Claimant asked for and received increasing amounts of narcotics. During the course of this lengthy pain management, Dr. Zoe recorded Claimant was noncompliant in limiting her narcotics. After nearly more two years of palliative care, primarily including narcotics, without objective indicia of any improvement in function, about May 1, 2009, Dr. Zoe informed Claimant she would begin a regimen to reduce and discontinue the narcotics. Claimant did not return to Dr. Zoe.

110. On September 2, 2010, Dr. Poston began his pain management, including narcotics. By June 2014 Dr. Poston recorded he would discontinue prescribing narcotics based upon Claimant's noncompliance. There are no more recent records from Dr. Poston in evidence.

111. Moreover, a significant amount of Dr. Poston's treatment included a spinal stimulator. The preponderance of evidence shows it failed to restore function in any objective way. Although still in recovery, Claimant returned to work in January 2006 and continued

to work into May 2006. She has not worked since. Testimony of Claimant's mother established that Claimant's activities of daily living have not improved since Claimant moved in with her in October 2011.

112. Considering the totality of facts and circumstances, Claimant's condition, related to the 2005 industrial accident reached MMI as of August 7, 2007. Medical care benefits thereafter were merely palliative and failed to restore function to any useful degree. Claimant has been actively uncooperative in assisting in her recovery and in improving her function post-recovery. Defendants did not act unreasonably in paying significant medical benefits into April 2009 and in refusing to pay additional medical benefits thereafter.

113. Claimant failed to show Dr. Poston's post-MMI palliative care was reasonable or probably related to the 2005 industrial accident or as a compensable consequence of it.

#### **Temporary Disability**

114. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq.* Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001). An injured worker who is unable to work while in a period of recovery is entitled to temporary disability benefits under the statutes until he has been medically released for work and Employer offers reasonable work within the terms of the medical release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217, (1986).

115. TTD benefits were identified as an issue in Claimant's Complaint. However, when Claimant requested a hearing in this matter she did not expressly identify a dispute over TTD benefits as being relevant for hearing. Her identification of a dispute over competing MMI dates does not, by itself, reasonably provide notice of an ongoing TTD dispute.

116. The Notice of Hearing did not identify TTD benefits as an issue for hearing. Often issues raised in a Complaint or Answer are resolved before hearing. A major purpose of issuance of a Notice of Hearing by the Commission is to provide the parties an opportunity to review and determine that all relevant issues will be addressed at hearing. Neither party sought the addition of an issue of TTD benefits.

117. No party raised an issue of TTD benefits at hearing.

118. The first mention of an issue of unpaid TTD benefits arose in Claimant's posthearing brief. There Claimant merely alleged that 168 weeks had passed to a proposed MMI date of January 28, 2009 and only 156 weeks of TTDs had been paid. Claimant failed to account for the period in January through May 2006 when Claimant actually worked. Rather, given the actual MMI date of August 9, 2007 it appears Defendants may have overpaid TTD benefits.

119. Defendants paid TTD benefits for certain weeks well after the actual MMI date of August 9, 2007. However, neither Defendants' Answer nor request for calendaring raised an issue of overpayment of TTDs. No such issue was raised at hearing. Defendants argued for overpayment in briefing in response to Claimant's belated assertion of these benefits.

120. The issue not having been timely or properly raised, TTD benefits or overpayment therefor are not under consideration at this time. Factually, it appears from the record available that Claimant has received all TTD benefits to which she would be entitled.

#### **Permanent Impairment**

121. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker &*

*Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

122. Dr. Huntsman rated Claimant's knee at 3% PPI. Other physicians have rated it at 5%. There is not a significant objective basis for distinction between these ratings. Competent physicians evaluated Claimant clinically and applied their findings to *AMA Guides*.

123. A PPI rating of 5% of the whole person, causally related to Claimant's knee condition and 2005 industrial accident, without apportionment to her 1994 preexisting knee condition, is appropriate.

#### **Permanent Disability**

124. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

125. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

126. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423

and 72-425, *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

127. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, she is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley, supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

128. Here the extent of Claimant's actual injury at the time of the 2005 industrial accident is insignificant. She suffered, at most, a minor sprain. However, extensive medical treatment, including three arthroscopic surgeries and several injections have produced a harmful result. Medical opinions persuasively suggest some pain may be the result of scarring from the surgeries. Protracted treatment has enabled Claimant's perception of chronic pain.

129. On the other hand, Claimant was capable and did return to work in 2006. The record does not show that her condition has objectively worsened. The record does not show a likely basis to explain why she has not worked since. Physicians relying upon objective findings



have refused to impose any restrictions. Other physicians have suggested only nonspecific, nonquantifiable limitations, dependent upon Claimant's perceptions of her tolerance.

130. The consensus of medical opinion agrees Claimant should be weaned from narcotic medications. Claimant has sabotaged attempts to do so. Moreover, Claimant was taking narcotics for a finger injury before the 2005 industrial accident. Causation for her addiction has not been shown to be a likely iatrogenic, compensable consequence of her knee injury.

131. Physicians have suggested potential secondary gain without opining to the standard of medical probability. This issue presents myriad conflicting underlying facts. Claimant's teenage psychological/behavioral history; her use and abuse of medications; Social Security data showing less than full-time, minimum-wage work on an annual basis throughout her work life; prolonged palliative care, including a spinal stimulator, paid by Medicaid; the fact of the duration of active, palliative treatment; her living conditions since October 2011 enabling her perception and lifestyle of disability; these factors all appear to have contributed to the complexity of this issue. The record is insufficient to establish a finding for or against Claimant with regard to secondary gain as a motivation.

132. One or more pain physicians and physicians whose opinions Claimant has sought outside the chain of referral have suggested possible limitations of activity without specifically imposing restrictions. These opinions are unpersuasive. They have done so based upon Claimant's subjective reporting which is inconsistent with all objective measures. Although it would be logical and statutorily consistent to deny disability in excess of PPI based upon the absence of medically-imposed, objectively-based restrictions, one is left with a pervasive disquiet. After nearly 10 years of minimal function, the likelihood of ever returning to gainful

employment appears extremely remote.

133. Clearly, Claimant is not totally and permanently disabled. She is not 100% disabled. She does not qualify as an odd-lot worker. Claimant withdrew these issues at hearing.

134. Equally clearly, the accident and injury described in early medical records is not of the sort that anyone could reasonably expect to have caused more than a brief absence from work with a full and timely recovery with minimal, if any, permanent residual.

135. Claimant has refused some conservative treatment measures and has been uncooperative with others. She has changed physicians when a discontinuation of narcotic prescriptions was announced or seemed imminent.

136. Claimant failed to show why she has not attempted to work since May 2006. Claimant failed to establish by a preponderance of evidence that she is entitled to disability in excess of PPI as a result of her 2005 industrial injury.

#### **Attorney Fees**

137. Applying Idaho Code § 72-804, Defendants have acted reasonably at all times. In hindsight, by complying with the ultimately rejected opinions of Drs. Gussner and Friedman about MMI in 2008, they have paid more than legally required. Defendants are to be commended for paying for palliative care well beyond the date of MMI.

#### **CONCLUSIONS**

1. Claimant injured her knee in a compensable accident on October 30, 2005;
2. Claimant is entitled to medical care benefits related to the injury to the date of medical stability, August 9, 2007. She failed to show she is entitled to palliative treatment thereafter. Defendants did not unreasonably discontinue payment of palliative treatment in April 2009;
3. TTD benefits or overpayment therefor were issues not timely or properly raised.

Nevertheless, the record shows TTD benefits were appropriately paid to the date of medical stability;

4. Claimant is entitled to PPI rated at 5% of the whole person, without apportionment;

5. Claimant failed to show it likely she suffered permanent disability in excess of PPI as a result of the 2005 accident; and

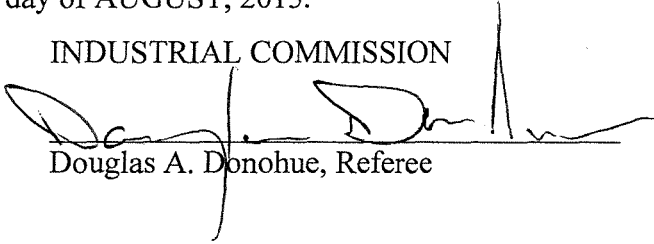
6. Defendants are not liable for payment of Claimant's attorney fees.

### RECOMMENDATION


Based on the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

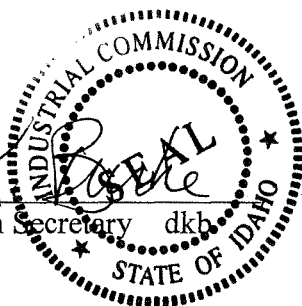
DATED this 24<sup>th</sup> day of AUGUST, 2015.

INDUSTRIAL COMMISSION

  
Douglas A. Donohue, Referee

ATTEST

  
Assistant Commission Secretary dkb



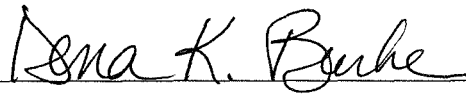
### CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of September, 2015, a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION were served by regular United States Mail upon each of the following:

PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402

W. SCOTT WIGLE  
P.O. BOX 1007  
BOISE, ID 83701

dkb



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH,  
Claimant,  
v.  
THE HOME DEPOT, INC.,  
Employer,  
and  
INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,  
Surety,  
Defendants.

IC 2005-011806

ORDER

**FILED**

SEP 23 2015

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant injured her knee in a compensable accident on October 30, 2005.
2. Claimant is entitled to medical care benefits related to the injury to the date of medical stability, August 9, 2007. She failed to show she is entitled to palliative treatment thereafter. Defendants did not unreasonably discontinue payment of palliative treatment in April 2009.
3. TTD benefits or overpayment therefor were issues not timely or properly raised. Nevertheless, the record shows TTD benefits were appropriately paid to the date of medical stability.

4. Claimant is entitled to PPI rated at 5% of the whole person, without apportionment.

5. Claimant failed to show it likely she suffered permanent disability in excess of PPI as a result of the 2005 accident.

6. Defendants are not liable for payment of Claimant's attorney fees.

7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 23<sup>rd</sup> day of September, 2015.

INDUSTRIAL COMMISSION

R D Maynard  
R. D. Maynard, Chairman

Thomas E. Limbaugh  
Thomas E. Limbaugh, Commissioner  
"RECUSED"

Thomas P. Baskin, Commissioner

ATTEST: Dena K. Burke  
Assistant Commission Secretary  


#### CERTIFICATE OF SERVICE

I hereby certify that on the 23<sup>rd</sup> day of September, 2015, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402

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BOISE, ID 83701

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Dena K. Burke

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*Attorneys for Appellant/Claimant*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH, )  
 )  
 Appellant/Claimant, )  
 v. )  
 )  
 THE HOME DEPOT, INC., )  
 )  
 Employer, )  
 and )  
 )  
 INSURANCE COMPANY OF THE )  
 STATE OF PENNSYLVANIA, )  
 )  
 Surety, )  
 )  
 Respondents/Defendants. )  
 \_\_\_\_\_ )

I.C. No.: 2005-011806

NOTICE OF APPEAL.

**FILED**

**OCT 29 2015**

**INDUSTRIAL COMMISSION**

TO: THE ABOVE NAMED RESPONDENTS, THE HOME DEPOT, INC., and  
 INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, BY AND  
 THROUGH THEIR ATTORNEY OF RECORD, SCOTT WIGLE, and THE CLERK  
 OF THE IDAHO INDUSTRIAL COMMISSION,

NOTICE IS HEREBY GIVEN THAT:

NOTICE OF APPEAL.

PAGE 1

47

Fax-

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*Attorneys for Appellant/Claimant*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH, )  
 )  
 Appellant/Claimant, )  
 v. )  
 )  
 THE HOME DEPOT, INC., )  
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 and )  
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 STATE OF PENNSYLVANIA, )  
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 Surety, )  
 )  
 Respondents/Defendants. )  
 \_\_\_\_\_ )

I.C. No.: 2005-011806

NOTICE OF APPEAL.

**FILED**

**OCT 29 2015**

**INDUSTRIAL COMMISSION**

TO: THE ABOVE NAMED RESPONDENTS, THE HOME DEPOT, INC., and  
 INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, BY AND  
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PAGE 1

47

FILED

Paul T. Curtis, #6042  
Andrew A. Adams, #8596  
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Idaho Falls, ID 83402  
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*Attorneys for Appellant/Claimant*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH, )  
 )  
Appellant/Claimant, )  
v. )  
 )  
THE HOME DEPOT, INC., )  
 )  
Employer, )  
and )  
 )  
INSURANCE COMPANY OF THE )  
STATE OF PENNSYLVANIA, )  
 )  
Surety, )  
 )  
Respondents/Defendants. )  
\_\_\_\_\_ )

I.C. No.: 2005-011806

NOTICE OF APPEAL

FILED  
OCT 30 2015  
INDUSTRIAL COMMISSION

TO: THE ABOVE NAMED RESPONDENTS, THE HOME DEPOT, INC., and  
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, BY AND  
THROUGH THEIR ATTORNEY OF RECORD, SCOTT WIGLE, and THE CLERK  
OF THE IDAHO INDUSTRIAL COMMISSION,

NOTICE IS HEREBY GIVEN THAT:

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1. The above-named appellant, CHANNEL (BLACKER) RISH, appeals against the above-named respondents to the Idaho Supreme Court from that Order of the Industrial Commission of the State of Idaho, entered in the above-entitled action on the 23rd day of September, 2015, by the Commissioners of the Idaho Industrial Commission, R. D. Maynard, Chairman.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 is appealable pursuant to I.A.P. Rule 11(d).

3. Appellant contends that the Industrial Commission's Order is erroneous as a matter of law and it is not supported by substantial and competent evidence. More specifically, the Commission erred in denying Claimant reasonable medical care for a reasonable period of time after her industrial injury.

Other issues may be presented on appeal.

4. Appellant is not aware of any portion of the record having been ordered sealed.

5. (a) Reporter's transcript is requested.

(b) Appellant requests the entire reporter's transcript of the hearing on August 26, 2014, Sandra J. Beebe, C.S.R., estimated pages 129, is requested in hard copy format.

6. Appellant requests the documents to be included in the agency's record to include those automatically included per I.A.R. 28(b)(3).

7. Appellant also requests the following additional documents:

- copies of all depositions taken in this matter;
- copies of all briefs;

- copies of all exhibits;

8. I certify that:

(a) The clerk of the Industrial Commission is being paid the fee of \$100.00 for preparation of the Clerk's record;

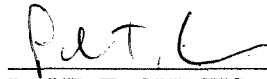
(b) The appellate filing fee in the amount of \$94.00 is being paid herewith;

(c) Service of this Notice of Appeal has been made upon all parties required to be served pursuant to I.A.R. Rule 20.

Dated:

Respectfully submitted,

October 29, 2015



PAUL T. CURTIS

Attorney for Claimant/Appellant

## Certificate of Service

I hereby certify that on the 29 day of October, 2015, a true and correct copy of the foregoing NOTICE OF APPEAL was served upon the following parties, attorneys and/or court reporting services of record by the method indicated:

IDAHO INDUSTRIAL COMMISSION  
700 S. Clearwater Lane  
Boise, ID 83712

☒ Express Mail

☒ Facsimile (208) 332-7558

Mr. Scott Wigle  
BOWEN & BAILEY  
P.O. Box 1007  
Boise, ID 83701  
208-344-7200

☒ First class mail

☒ Facsimile: (208) 344-9670

M&M Court Reporting Service, Inc.  
421 W. Franklin  
P.O. Box 2636  
Boise, ID 83701-2636


☒ First class mail

T & T Reporting  
P.O. Box 1020  
Idaho Falls, ID 83405

☒ First class mail

Sandra J. Beebe, C.S.R.  
P.O. Box 658  
Blackfoot, ID 83221

☒ First class mail

  
\_\_\_\_\_  
Paul T. Curtis

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS

CHANNEL (BLACKER) RISH,

Claimant-Appellant,

v.

THE HOME DEPOT, INC., Employer,  
and INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, Surety,

Defendants-Respondents.

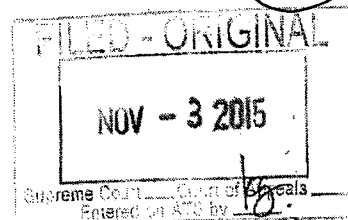
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SUPREME COURT NO. 43677

CERTIFICATE OF APPEAL  
OF CHANNEL (BLACKER) RISH

Appeal From: Industrial Commission Chairman R.D. Maynard presiding.  
Case Number: IC 2005-011806  
Order Appealed from: FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
RECOMMENDATION AND ORDER ENTERED ON  
SEPTEMBER 23, 2015  
Attorney for Appellant: PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402  
Attorney for Respondents: W. SCOTT WIGLE  
P.O. BOX 1007  
BOISE, ID 83701  
Appealed By: CHANNEL (BLACKER) RISH, Claimant  
Appealed Against: THE HOME DEPOT, INC., and INSURANCE COMPANY  
OF THE STATE OF PENNSYLVANIA,  
Notice of Appeal Filed: FAXED// OCTOBER 29, 2015 and  
\*original with checks OCTOBER 30, 2015  
Appellate Fee Paid: \$94.00 SC Fee paid & \$100 Industrial Commission deposit paid  
Name of Reporter: SANDRA J. BEEBE, CSR  
P.O. BOX 658  
BLACKFOOT, ID 83221  
Transcript Requested: The entire standard transcript has been requested.  
The standard transcript has been prepared and  
is on file with the Industrial Commission.  
Dated: OCTOBER 30, 2015  
  
Dena K. Burke, Assistant Commission Secretary

CERTIFICATE OF APPEAL OF CHANNEL (BLACKER) RISH -- 1

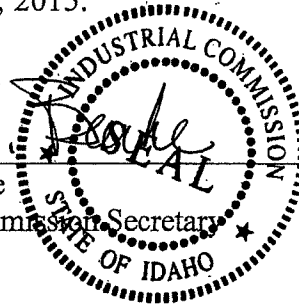


### CERTIFICATION

I, DENA K. BURKE, the undersigned Assistant Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the **NOTICE OF APPEAL FILED OCTOBER 29, 2015; THE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION AND ORDER ENTERED SEPTEMBER 23, 2015**, herein, and the whole thereof, in IC case number 2005-011806 for Claimant name CHANNEL (BLACKER) RISH.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 30TH day of OCTOBER, 2015.

  
\_\_\_\_\_  
Dena K. Burke  
Assistant Commission Secretary



CERTIFICATION


### CERTIFICATION OF RECORD

I, DENA K. BURKE, the undersigned Assistant Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record **Supreme Court No. 43677** on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 15<sup>th</sup> day of DECEMBER, 2015.

INDUSTRIAL COMMISSION

  
Dena K. Burke  
Assistant Commissioner Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

CHANNEL (BLACKER) RISH,

Claimant-Appellant,

v.

THE HOME DEPOT, INC., Employer,  
and INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA, Surety,

Defendants-Respondents.

SUPREME COURT NO. 43677

NOTICE OF COMPLETION

**TO: STEPHEN W. KENYON, CLERK OF THE COURTS;  
AND PAUL T. CURTIS, ESQ., FOR CLAIMANT CHANNEL (BLACKER) RISH;  
AND W. SCOTT WIGLE, ESQ., FOR DEFENDANTS THE HOME DEPOT, INC.,  
and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

PAUL T. CURTIS  
598 NORTH CAPITAL AVENUE  
IDAHO FALLS, ID 83402

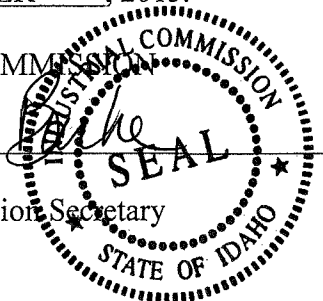
W. SCOTT WIGLE  
P.O. BOX 1007  
BOISE, ID 83701

You are further notified that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have *twenty-eight days* from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed *within the twenty-eight day period*, the Transcript and Record shall be deemed settled.

DATED at Boise, Idaho this 15<sup>TH</sup> day of DECEMBER, 2015.

INDUSTRIAL COMMISSION

*Dena K. Burke*  
Dena K. Burke  
Assistant Commission Secretary



NOTICE OF COMPLETION (CHANNEL (BLACKER) RISH SC# 43677) - 1